

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 54911-g42M BY SACKMAN, INC.)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision of January 12, 1988, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, a Provisional Permit is hereby granted to Sackman, Inc. to appropriate 400 gpm up to 56.88 acre-feet of water per year for supplemental flood irrigation of 31.6 acres: 10 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34, and 21.6 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 34,

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Township 13 North, Range 52 East, Prairie County, Montana. The source of supply is groundwater, to be diverted by means of a well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34, Township 13 North, Range 52 East, Prairie County, Montana. The period of use is April 1 through October 31, inclusive, of each year.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior existing water rights in the source of supply, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Applicant to the detriment of any senior appropriator.

B. This Permit is subject to MCA §85-2-505 (1987), which requires that all wells be constructed so that they will not allow water to be wasted, or contaminate other water supplies or sources, and which requires that all flowing wells shall be capped or equipped so that the flow of water may be stopped when not being put to beneficial use.

C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittee's permitted uses.

D. The Permittee shall keep a flow meter installed on its well, capable of measuring the amounts of water pumped. The Permittee shall keep a written record of the flow rate and volume of all waters withdrawn, including the times of pumping, and shall make these records available to the Department upon request.

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E. The issuance of this Provisional Permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 11 day of February, 1988.

G. Fritz
Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was served by mail upon all parties of record at their address or addresses this 11th day of February, 1988, as follows:

Sackman, Inc.
Box 11
Terry, MT 59349

Mr. and Mrs. Adolph Schott
Fallon, MT 59326

Louise Schmidt
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Fallon, MT 59326

Donald S. and Dorothy Finneman
Box 6
Fallon, MT 59326

Robert and Mary Ruth Lausch
Route 2, Box 11
Terry, MT 59349

Jacob J. Schwartz
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A. Lance Tonn
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Jacob Huber
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Bruce M. Brown
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Arthur and Elsie Neumiller
Fallon, MT 59326

Robert and Evelyn McMakin
Box 216
Fallon, MT 59326

Fallon Water Well
Evelyn McMakin
Box 216
Fallon, MT 59326

Larry and Jane Neumiller
Box 1683
Colstrip, MT 59323

Clara Dirks
Fallon, MT 59326

Mr and Mrs George Armstrong
Ella Armstrong
Fallon, MT 59326

John M and Emma Smith
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Daniel V. Dukart
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Ludwig R. and Alice Huber
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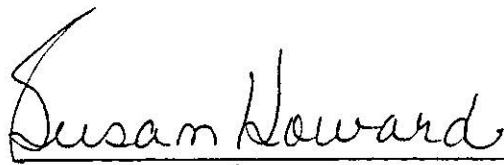
Henry and Lois Damm
Fallon, MT 59326

Walter Rolf
Miles City Field Office
Miles City, MT
(inter-departmental mail)

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Box 183
Fallon, MT 59326


Susan Howard
Hearings Reporter

CASE # 54911

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 54911-g42M BY SACKMAN, INC.)

* * * * *

The issuance of a provisional Permit in this matter was made contingent upon specified aquifer tests designed to ensure that the Applicant can meet the statutory criteria for issuance of a Permit, see MCA §85-2-311, and upon an opportunity for all parties to review the test results and to present evidence and testimony on the issue of adverse effect.

The testing was completed, and a review of the monitoring data was made by Department hydrogeologist Mark Shapley. (See June 25, 1987 Review of the Sackman, Inc. Monitoring Data.) This review was mailed to all parties of record, with a cover letter requesting that the parties review the report and notify the Department if further information on the test results was needed. The only response received by the Department was a letter from Mearl and Irene Detienne, stating that their well was used for drinking and other domestic water, and expressing concern over the possibility of water contamination. No party requested further information or a reconvening of the hearing in this matter. Therefore, the decision in this matter has been made on the basis of the record in this matter, which consists of testimony and exhibits presented at the

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nctober 12, 1984 hearing, the Department file, the May 15, 1985 Proposal for Decision and the July 25, 1985 Final Order, the test data, and the Department review of test data in this matter.

This Proposal for Decision incorporates the Findings of Fact and Conclusions of Law as contained in the May 15, 1985 Proposal for Decision in this matter, by reference, as well as setting forth the following additional Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

21. The Applicant conducted the well-monitoring program set forth in the July 25, 1985 Final Order in this matter, pursuant to the Interim Permit which was granted for testing purposes. The testing, which was supervised by Department personnel, yielded water level records which were submitted to Department hydrogeologists for review.

On the basis of the test results, Department hydrogeologist Mark Shapley determined that any drawdown which the Applicant's well may cause in the aquifer is compensated for by recharge to the aquifer, "apparently derived from the infiltration of irrigation water applied to Sackman's fields." (See Mark Shapley's June 25, 1987 Review of the Sackman, Inc. Monitoring Data, page 2.) Mr. Shapley concluded that "it is reasonable to conclude that as long as the irrigation water is applied similarly to the 1986 season, the observation well will at worst experience roughly equivalent drawdown and recharge during a season, resulting in no significant net drawdown." (Review, page 3.) Mr. Shapley added that this holds

true only as long as the location and manner of the Applicant's irrigation remains unchanged.

22. The hydrogeologic review of the well-monitoring data advises the parties in this matter of the possibility that the Objectors' wells are vulnerable to contamination, due to the permeability and shallowness of the terrace gravels in the area. (Review, page 3.) However, there is no information in the report or elsewhere in the record which indicates that the Applicant's use of water is adversely affecting the water quality of the Objectors' wells.

Although the report raises the question of water quality, it does not provide sufficient specific information (concerning such factors as to whether, or to what extent, local gradient reversals cause water from the Applicant's place of use to reach the Objectors' wells; whether the Applicant is using agricultural chemicals which would render water unpotable or otherwise unfit for domestic uses; whether such chemicals would reach other wells in measurable quantities; to what extent the Objectors' own uses of fertilizers or other chemicals might be responsible for any potential water quality problems, and whether - and how - any contamination could be traced) to constitute a prima facie case that the Applicant will cause adverse effect to the water rights of other appropriators.

Based upon the Foregoing additional Findings of Fact, the Hearing Examiner makes the following additional:

CONCLUSION OF LAW

(Conclusions of Law 10 through 14, as contained in the May 15, 1985 Proposal for Decision in this matter, are superseded by the following Conclusion of Law.)

16. The record in this matter provides substantial credible evidence that the water rights of prior appropriators will not be adversely affected.

The well-monitoring and testing data, and the technical review of this data, indicate that the Applicant's pumping does not cause any discernible drawdown in the aquifer. (Finding of Fact 21.) It is possible that the recharge which apparently counterbalances any drawdown the Applicant's appropriation may have on the aquifer might be diminished if the Applicant changed his place of use or method of irrigation. However, the Applicant may not change his appropriation without providing substantial credible evidence that the change will not adversely affect the water rights of other persons (see MCA §85-2-402 and Permit condition A, infra). Any changes which the Applicant might make in the future are subject to Department and/or court action for the protection of the prior appropriators; however, a decision on the present Application must be based on what actually has been applied for (flood irrigation of the specified place of use).

Additionally, there is not substantial, credible evidence in the record that prior appropriators' water rights will be adversely affected due to water quality problems. The hydrogeology review done in this matter, which referred to the potential for water

contamination which the local hydrogeology creates, did not provide any information which suggests that the Applicant's proposed use of water will adversely change water quality in the Objectors' wells. (See Finding of Fact 22.) Because water quality concerns were not raised prior to, or at, the hearing in this matter and the record closed after the testing, the only evidence of record regarding this issue is an unsubstantiated and therefore speculative remark made in the report. Such evidence does not meet the threshold test, which requires that before the Applicant is required to respond to an allegation of harm the record must contain evidence that would, if uncontradicted, show a causal connection between the proposed appropriation and the alleged harm. See In the Matter of the Application for Beneficial Water Permit Nos. 55834-s76LJ and 56386-s76LJ By Zon G. and Martha M. Lloyd (January 22, 1987 Final Order.) Mr. Shapley's remark does not qualify as such evidence.

In the absence of such a prima facie showing that the Applicant's proposed water use will cause adverse effect, the Hearing Examiner has no basis upon which to require further evidence from the Applicant on this issue.

Based upon the Findings of Fact and Conclusions of Law, and upon the complete record in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, a Provisional Permit is hereby granted to Sackman,

Inc. to appropriate 400 gpm up to 56.88 acre-feet of water per year for supplemental flood irrigation of 31.6 acres: 10 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34, and 21.6 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 34, Township 13 North, Range 52 East, Prairie County, Montana. The source of supply is groundwater, to be diverted by means of a well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34, Township 13 North, Range 52 East, Prairie County, Montana. The period of use is April 1 through October 31, inclusive, of each year.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior existing water rights in the source of supply, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Applicant to the detriment of any senior appropriator.

B. This Permit is subject to MCA §85-2-505 (1987), which requires that all wells be constructed so that they will not allow water to be wasted, or contaminate other water supplies or sources, and which requires that all flowing wells shall be capped or equipped so that the flow of water may be stopped when not being put to beneficial use.

C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittee's permitted uses.

D. The Permittee shall keep a flow meter installed on its well, capable of measuring the amounts of water pumped. The Permittee shall keep a written record of the flow rate and volume of all waters withdrawn, including the times of pumping, and shall make these records available to the Department upon request.

E. The issuance of this Provisional Permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. Exceptions in this matter are limited to the additional test data, Findings of Fact, Conclusions of Law, and Order which have been made subsequent to the July 25, 1985 Final Order in this matter. No

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final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 12th day of January, 1988.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

54911

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by mail upon all parties of record at their address or addresses this 12th day of January, 1988, as follows:

Sackman, Inc.
Box 11
Terry, MT 59349

Mr. and Mrs. Adolph Schott
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Louise Schmidt
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Donald S. and Dorothy Finneman
Box 6
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Robert and Mary Ruth Lausch
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Jacob J. Schwartz
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A. Lance Tonn
Lucas and Monaghan, P.C.
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Henry Gaub
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Robert and Dorothy Caturia
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Jacob Huber
Fallon, MT 59326

Bruce M. Brown
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Arthur and Elsie Neumiller
Fallon, MT 59326

Robert and Evelyn McMakin
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Fallon Water Well
Evelyn McMakin
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Larry and Jane Neumiller
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Clara Dirks
Fallon, MT 59326

Mr and Mrs George Armstrong
Ella Armstrong
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John M. and Emma Smith
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CASE #54911

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Box 273
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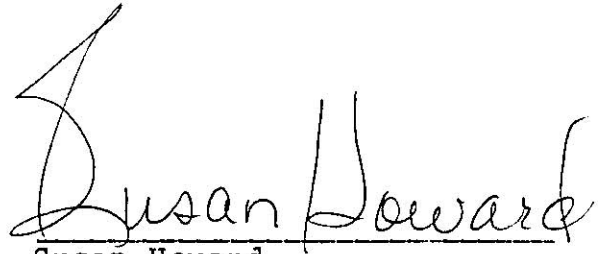
Henry and Lois Damm
Fallon, MT 59326

Walter Rolf
Miles City Field Office
Miles City, MT
(inter-departmental mail)

Mrs. Emilie Schwabe
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Fallon, MT 59326

Willim and Mary Twitchell
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Fallon, MT 59326

Bernard W. Rakes
Box 183
Fallon, MT 59326


Susan Howard
Hearings Reporter

CASE # 54911

pp 2, 3, 4
Interim Permit for testing - will not automatically get provisional permit
App. must pay for well monitoring system

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 54911-g42M BY SACKMAN, INC.)

* * * * *

The time period for filing exceptions to the Hearing Examiner's May 15, 1985, Proposal for Decision has expired. Timely exceptions were received from the Applicant and from thirty of the Objectors. In addition, written comments were received from Walter Rolf, Field Manager of the Miles City Water Rights Bureau Field Office.

For the reasons stated below and after having given the exceptions full consideration, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as set forth in the May 15, 1985 Proposal for Decision, and incorporates them herein by reference.

RESPONSE TO EXCEPTIONS

Applicant's Exception.

The Applicant, Sackman, Inc., bases its exception to the Proposal for Decision on the grounds that "Southeastern Montana is in a severe drought condition at this time and testing would not be based on a normal year", and that the test pumping should be done over a two to five year span so that findings would be based on normal precipitation.

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The Proposal for Decision clearly indicates that the test pumping is being done for purposes of ascertaining whether the water rights of a prior appropriator will be adversely affected. It is not being done to determine the availability of water. (Compare Proposed Conclusions of Law 7 and 10, Proposal for Decision.)

For purposes of determining whether the Applicant's proposed appropriation will harm one of the senior users, a dry year is preferable actually to a wet year, since it provides a "worst case scenario": if the Applicant's pumping does not adversely affect prior appropriators under drought conditions, it is highly unlikely to affect the other appropriators under conditions where more water is available. On the other hand, if the test pumping was done during a "wetter" year, as proposed by the Applicant, a lack of adverse affect could not be construed to indicate that the prior appropriators would not be harmed during drier irrigation seasons, and the MCA § 85-2-311 criteria requiring substantial credible evidence on this issue would not be met. For these reasons, the test period will expire October 31, 1986, as set forth in the Proposal for Decision.

Objectors' Exceptions

Art and Elsie Neumiller submitted an exception based on the Applicant's being able to obtain water from the Buffalo Rapids Project, and on their concern about the effect of any additional drawdown on their well under the present dry conditions. Mearl and Irene DeTienne excepted on the same bases, voicing additional

concerns about the possibility of the Applicant's pumping drawing alkali into the aquifer, and about the number of people that could be affected by the proposed appropriation.

Robert and Dorothy Caturia submitted an exception based on the Applicant's ability to get water from Buffalo Rapids, and on their need for the water during Applicant's proposed period of appropriation. Henry and Lois Damm objected on the same bases, as did Jacob and Erna Schwartz (who were not present at the hearing in this matter), J. Hubert Schieffer, and Don and Dorothy Finneman.

Ludwig and Alice Huber wrote a general exception to the Proposal for Decision, stating that senior water appropriators should be protected. Larry and Jane Neumiller objected on the same bases. Robert and Mary Ruth Lausch, who were not present at the hearing, also submitted a general exception, which also stated that the fact the Applicant had already bought his pump and operated it should not be an excuse for the Application to be approved. Mr. and Mrs. Adolph Schott, who also did not attend the hearing, submitted a general objection.

George and Ella Armstrong submitted an exception stating that the Objectors "dispute the computations of the water table draw down on the basis of their hisotorical (sic) experience with Objectors' and surrounding wells", that some of the Objectors' wells date from 1910 and the Armstrong well dates from 1929, that there is a discrepancy in the record concerning whether the Applicant has test pumped the well, that the Objectors dispute

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that there is excess water available for diversion, and that the majority of the Objectors are senior citizens living on limited incomes, who are without an alternative domestic water source.

Mr. and Mrs. Armstrong's exception was signed by 33 additional people, 14 of whom did not object to the Application and who are not parties in this matter. William and Christine Mocko, who were among those signers of the Armstrong exception who are not parties in this matter, also submitted a separate exception.

To respond first to the Objectors' individual concerns:

Mr. and Mrs. DeTienne stated a concern that Applicant's proposed pumping might draw alkali into the aquifer. This issue was addressed in the Proposal for Decision. See, Finding of Fact 20. The geohydrologist's testimony indicates that pumping can have the effect of pulling in poor quality water if it exists in the area. However, the only suggested area of poor quality water is O'Fallon Creek. Assuming arguendo that the Applicant's cone of depression might extend as far as that creek (which is unlikely, given the projected drawdown radius), the geohydrology testimony that the ground water in the area moves generally south to north indicates that any alkaline water which might be pulled in would be carried away from the Objectors' wells, since the Applicant's well is located north of the Objectors' wells.

To respond to Mr. and Mrs. Lausch's concern that the Applicant somehow might get "credit" for having already drilled the well and purchased a pump, it should be stated that the Department does not use the fact of an Applicant's financial

outlay to weigh in their favor. See generally In the Matter of the Application for Change of Appropriation Water Rights Nos. G-05081 and G-05083 by Neil W. Moldenhauer, Final Order, March 20, 1984. Whether or not the Applicant has already expended money in connection with the proposed appropriation is not a factor which is taken into account in the criteria for issuance of a permit (see MCA § 85-2-311), nor has it been given any weight in this matter.

Correspondingly, any money which the Applicant may spend for the purpose of carrying out the required monitoring and testing will not sway a decision on issuance of a provisional permit: the only basis on which such a permit will be issued is that the Applicant has proved all of the permit criteria by substantial credible evidence. See Conclusion of Law 14.

Mr. and Mrs. Armstrong stated in their exception that there is a discrepancy in the record concerning whether or not the Applicant has test pumped the well in question. However, the only, and therefore uncontraverted, evidence in the record on this point is Mr. Sackman's testimony that the well driller put a pump in the well "to clean it out". See Finding of Fact 6. The well was pumped for 5 hours at 400 gpm. See Applicant's Exhibit 2.

Mr. and Mrs. Armstrong also stated that the Objectors dispute the projected drawdown, based on their own experience. The Department previously has held that the testimony of an expert need not be accorded greater weight than that of farmers who have long-standing familiarity with the area. See In the Matter of

the Application for Beneficial Water Use Permit No., 24921-s41E
by Remi and Betty Jo Monforton, Proposal for Decision,
September 30, 1981 (Final Order, March 1, 1982.)

However, in the present matter, the Objectors did not provide any testimony or other evidence concerning drawdown, apart from general claims of mutual well interference. (See Findings of Fact 11, 12, and 14.) Mr. DeTienne testified as to the drawdown his pumping causes on his own well (Finding of Fact 13), and Mr. Schieffer testified that he couldn't get water from his well when everyone was irrigating their gardens (Finding of Fact 14), but the Objectors did not give any specific information concerning the drawdowns they have experienced, nor did they provide any alternate projections as to the drawdown which the Applicant's well may cause. There is nothing in the record to suggest that the geohydrologist's projected figures are not reasonable estimates of the drawdown which may occur (Finding of Fact 19), or that the projected drawdown will be sufficient to adversely affect the Objectors.

In addition, the fact that Mr. Schieffer and other Objectors already have experienced problems with their wells prior to appropriation by the Applicant suggests that the Objectors' own wells may, to some degree, be at fault, possibly due to the shallow depth of their wells. As the Department has discussed in previous instances, appropriators are not entitled to tie up a source of water simply to avoid having to upgrade their means of diversion. See In the Matter of the Application for Beneficial Water Use Permit No. 31,441-g41R by Jim McAllister, Proposal for Decision, June 19, 1985.

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. . . [P]riority of appropriation does not give a right to an inefficient means of diversion, such as a well which reaches such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by others did not deplete the stream below where there would be an adequate supply for the senior's lawful demand.

City of Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961) at 555. See also Alamosa-LaJara Water Users Association v. Gould, 674 P.2d 914 (1983); Wayman v. Murray City Corporation, 23 Utah 2d 97 458 P.2d 861 (1969); Doherty v. Pratt, 34 Nev. 343, 124 P. 574 (1912).¹

Assuming that the Objectors have reasonable means of diversion, however, the Department recognizes that there is some possibility that the drawdown rates and/or recharge rates projected by the geohydrologist will not be borne out in actual practice, and that the water rights of a prior appropriator will be adversely affected. (Proposal, Finding of Fact 10). It is for this reason that the Applicant has been given only a "temporary" permit until the actual effects of Applicant's pumping can be determined through testing.

The testing additionally will ensure that adequate water is available for the proposed appropriation, although the record in this matter indicates that there are unappropriated waters

¹ However, courts have also looked at the "economic reach" of the senior appropriators, and found that they "cannot be required to improve their extraction facilities beyond their economic reach, upon a consideration of all the factors involved." Colorado Springs, supra. This balancing approach would take into account the "limited incomes" which the Objectors have emphasized as characterizing their financial situation.

available (see Finding of Fact 19; May 24, 1984 Geohydrology Report, Department Exhibit 1); the Objectors did not introduce any evidence to support their contention that no water is available for diversion.

The Objectors' additional, central exception is their contention that the Applicant should not be allowed to pump water from the aquifer in question when he has an alternate water source (Buffalo Rapids Project) available. However, a review of statutes and of case law provides no foundation for this argument. If an appropriator can make beneficial use of his intended appropriation without adversely affecting senior appropriators, and can meet the relevant statutory criteria, he is not bound to purchase water from an alternate source. See generally Boyd v. Hoffine, 44 Mont. 306, 120 p. 228 (1911).

Field Office Comments

Written comments on the Proposal for Decision were submitted by Walter Rolf, Field Manager of the Miles City Water Rights Bureau Field Office. (Memorandum dated May 20, 1985; received by the Department on May 21, 1985.

In regard to Finding of Fact 6, Mr. Rolf states, "It is my understanding that the water from the ditch is carried by the siphon from the south side of the road to the 31.6 acres on the north side and not vice versa." This is a correct statement of the situation: the word "south" in Finding of Fact 6 is erratum, and should read "north". (See Notice of Erratum, infra.)

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Mr. Rolf also noted that the volume of water granted for the Interim Permit had not been reduced, although the Applicant had testified that he would be irrigating 20.1 acres less than he had applied for and that he would be willing to reduce the applied-for volume. Mr. Rolf suggested that, since the original Application was for 1.8 acre-feet of water per acre of land, the correct volume for the 31.6 acres would be 56.9 acre-feet rather than 93 acre-feet.

This also is correct. The Interim Permit in this matter will be issued with a volume of 56.88 acre-feet. Although the volume in the Proposed Order was listed as 93 acre-feet, the Applicant is not prejudiced by a reduction in the volume which corresponds to his reduction in acreage, since Mr. Sackman testified at the hearing that he was willing to so reduce the volume of water.

NOTICE OF ERRATUM

In the second paragraph of Finding of Fact 6, Proposal for Decision, the word "south" was inadvertently printed in place of the correct word "north". The erratum hereby is corrected, and the sentence is altered to read, "Water has to be dammed and then siphoned into a pipe to carry it to the twenty-acre field on the other (north) side of the highway."

Therefore, based upon the Findings of Fact and Conclusions of Law, all files and records in this matter, and any modifications specified herein, the Department makes the following:

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FINAL ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, an Interim Permit is hereby granted to Sackman, Inc. to appropriate 400 gpm up to 56.88 acre-feet per year for supplemental flood irrigation of 31.6 acres; 10 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34 and 21.6 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 34, Township 13 North, Range 52 East, Prairie County, Montana. The source of supply is groundwater, to be diverted by means of a well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34, Township 13 North, Range 52 East, Prairie County, Montana. The period of use is April 1 to October 31, inclusive, of each year.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. In order to receive an Interim Permit in this matter, the Applicant must elect to pay all necessary costs of installing and maintaining a well-monitoring system capable of recording the effects Applicant's pumping has on the source aquifer, with regard to the wells of the prior appropriators. The type of measuring device used, the installation and maintenance of the device, and procedures for keeping accurate records of the resulting data shall be subject to the supervision of a Department geohydrologist or his delegee.

Prior to commencing any appropriation pursuant to the Interim Permit, the Applicant must contact one of the Department geohydrologists and make acceptable test arrangements, including

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payment of any necessary costs and fees. The Applicant shall submit the agreed-upon monitoring plan to the Department in written form for review and approval before commencing irrigation.

B. The Permittee shall install a flow meter on its own well, capable of measuring the amounts and times of pumping.

C. The Permittee shall keep a written record of the flow rate and volume of all waters withdrawn, including the times of pumping, and shall make these records available to the Department upon request.

D. The Permittee shall cease pumping immediately upon notification by the Department that it has received a complaint by a prior appropriator alleging that the Permittee's pumping is affecting the prior appropriator's well to the extent that the senior water rights cannot reasonably be exercised. The Permittee shall not resume pumping until the Department notifies it of its right to do so.

E. Upon receipt of a written complaint alleging adverse effects to a prior appropriator, the Department may make a field investigation of the project. If the field investigation yields sufficient evidence to indicate that the prior appropriator would be able to exercise the water right in the absence of appropriation by the Permittee, the Department may conduct a hearing in the matter, allowing the Permittee to show cause why the Interim Permit should not be modified or revoked. The Department may then modify or revoke the Permit to protect

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existing rights, or may allow the Permit to remain unchanged if the Hearings Officer determines that no existing rights are being adversely affected by exercise of the Permit.

F. This Interim Permit is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

G. This Interim Permit is subject to MCA § 85-2-505, which requires that all wells be so constructed and maintained as to prevent wasting water or contamination of other water sources, and that all flowing wells be capped or equipped with valves so that the flow of water can be stopped when the water is not being put to beneficial use.

H. The issuance of this Interim Permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

I. This Interim Permit shall be valid through October 31, 1986, for purposes of determining the effects of the Permittee's pumping on the source aquifer and on the prior appropriators of that aquifer. Subsequent to the expiration of the Interim Permit in this matter, the Permittee and the prior appropriators will be allowed to present further evidence on the issue of adverse effect.


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J. The Miles City Water Rights Bureau Field Office, under the supervision of a Department geohydrologist, or their delegee, shall conduct periodic checks during times when the Permittee is appropriating water pursuant to this Permit, in order to determine the effects of the Permittee's pumping on the source aquifer and upon the senior beneficial water uses.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 25th day of July, 1985.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

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MEMORANDUM

The Department acknowledges the concerns of the Objectors in this matter. However, in light of the record in this matter, which indicates the likelihood that the Applicant will meet the criteria for issuance of a provisional permit, and of the State of Montana's policy of maximizing the beneficial use of water (see MCA § 85-2-101(3)), the Applicant is being given a chance to "prove up" under actual pumping conditions.

The issuance of an interim permit for testing does not mean that the Applicant automatically will be granted a provisional permit for long-range pumping. See Montana Administrative Rule § 36.12.204(3): "The issuance of an interim permit does not entitle an applicant to a regular permit, and approval of the application for a regular permit is subject to the procedures and criteria set out in the act." It means only that the Applicant will be allowed to pump for a limited time period to collect data, so that the Department can determine whether or not the water rights of prior appropriators (such as the Objectors) will be adversely affected.

It would not be reasonable to allow the Applicant to dry up the Objectors' wells, nor would it be reasonable to deny the Applicant the right to appropriate water if prior appropriators will not be harmed. A test period under actual conditions will not adversely affect the prior appropriators, and yet will provide protection for the Objectors by ensuring the pumping will be stopped if in fact it is adversely affecting the Objectors' water rights.

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To summarize, and perhaps clarify, the conditions under which the test pumping is to take place:

The Applicant, working in conjunction with a Department geohydrologist, must install and maintain a well-monitoring system which has been developed by the Department geohydrologist to show and record the effects of the Applicant's pumping on the source aquifer and on the wells of the prior appropriators. The well-monitoring system must be approved and installed prior to any appropriation by the Applicant.

The Applicant must install a flow meter on its well, and keep a written record of the flow rate and volume of all water appropriated, and of the times of pumping.

If the Department receives a complaint from a prior appropriator indicating that the Applicant's pumping is affecting the prior appropriators well to the extent that the senior water rights cannot reasonably be exercised, a member of the Miles City Field Office personnel, or a designated local person not a party in this matter, will check the prior appropriators' wells and the well-monitoring device. If it appears that the Applicant's pumping may be responsible for the adverse effect, the Department will immediately notify the Applicant to cease pumping. The Applicant shall not resume pumping until the Department notifies the Applicant that it may do so.

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In the above situation, or upon receipt of a written complaint alleging adverse affect to a prior appropriator, the Department may make a field investigation, which may include further testing by a Department geohydrologist or his delegee. If the field investigation yields sufficient evidence to indicate that the prior appropriator would be able to exercise his water right in the absence of appropriation by the Applicant, the Department will require the Applicant to go to hearing to show cause why the Interim (testing) Permit should not be modifed or revoked. The Department may then modify or revoke the Interim Permit to protect existing rights, or may allow the Permit to remain unchanged if the Hearings Officer determines that no existing rights are being adversely affected by exercise of the Permit.

Once the test period has expired, the results will be reviewed for the purpose of determining whether the Applicant will be granted a Provisional Permit. The Applicant and the Objectors will be allowed to present evidence, either in the form of written submissions, or at another hearing which would be limited to evidence and testimony on the issue of adverse effect.

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AFFIDAVIT OF SERVICE
FINAL ORDER
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on July 25, 1985, she deposited in the United States mail, First Class mail, an order by the Department on the Application by Sackman, Inc., Application No. 54911-g42M, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Sackman, Inc., Box 11, Terry, MT 59349
2. Bruce M. Brown, Attorney, Box 128, Miles City, MT 59301
3. Mr. & Mrs. Adolph Schott, Fallon, MT 59326
4. Arthur & Elsie Neumiller, Fallon, MT 59326
5. Louise Schmidt, Box 242, Fallon, MT 59326
6. Robert & Evelyn McMakin, Box 216, Fallon, MT 59326
7. Donald S. & Dorothy Finneman, Box 6, Fallon, MT 59326
8. Fallon Water Well, Evelyn McMakin, Box 216, Fallon, MT 59326
9. Robert & Mary Ruth Lausch, Rt. 2, Box 11, Terry, MT 59349
10. Leonard Neumiller, Box 172, Fallon, MT 59326
11. Larry & Jane Neumiller, Box 1683, Colstrip, MT 59323
12. Jacob J. Schwartz, P. O. Box 175, Fallon, MT 59326
13. Clara Dirks, Fallon, MT 59326
14. Clinton & Sheila Rakes, Box 264, Fallon, MT 59326
15. Berta Lassle, Box 262, Fallon, MT 59326
16. George & Ella Armstrong, Fallon, MT 59326
17. A. Lance Tonn, Lucas & Monaghan, P. C., P. O. Box 728, Miles City, MT 59301
18. Marvin, Joe & Jane Brush, Box 54, Fallon, MT 59326

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19. John & Emma Smith, Box 72, Fallon, MT 59326
20. Daniel V. Dukart, P. O. Box 53, Fallon, MT 59326
21. Henry Gaub, Box 126, Fallon, MT 59326
22. Phillip & Jakobine Stotz, Box 203, Fallon, MT 59326
23. Ludwig R. & Alice Huber, P. O. Box 24, Fallon, MT 59326
24. Robert & Dorothy Caturia, P. O. Box 171, Fallon, MT 59326
25. Albert & Erna Stickel, P. O. Box 205, Fallon, MT 59326
26. Jacob Huber, Fallon, MT 59326
27. James D. & Julie Sumrall, Box 251, Fallon, MT 59326
28. John Hubert Schreffer, Box 215, Fallon, MT 59326
29. Mrs. Emilie Schwabe, Box 52, Fallon, MT 59326
30. Mearl & Irene Detienne, Box 273, Fallon, MT 59326
31. William A. & Mary M. Twitchell, Box 62, Fallon, MT 59326
32. Henry & Lois Damm, Fallon, MT 59326
33. Bernard W. Rakes, Box 183, Fallon, MT 59326
34. Walter Rolf, Water Rights Bureau Field Office, Miles City, MT
(inter-departmental mail)
35. Peggy A. Elting, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

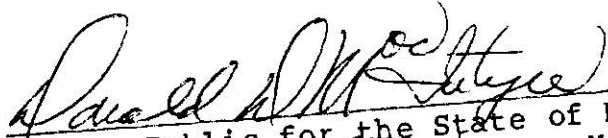
by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 25th day of July, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.


Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 12/15/87

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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 54911-g42M BY SACKMAN, INC.)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in the above-entitled matter was held on October 12, 1984, in Terry, Montana.

Sackman, Inc., the Applicant in this matter, was represented at the hearing by Herbert Sackman and by counsel Bruce M. Brown.

Objector Elsie Neumiller appeared personally at the hearing.

Objectors Robert and Evelyn McMakin appeared personally.

Objector Jane Neumiller appeared personally.

Objector Berta Lassele appeared personally.

Objectors George and Ella Armstrong appeared personally.

Objectors John and Emma Smith appeared personally.

Objectors Henry and Pauline Gaub appeared personally.

Objectors Phillip and Jakobine Stotz appeared personally.

Objectors L.R. and Alice Huber appeared personally.

Objectors Robert and Dorothy Caturia appeared personally.

Objectors Albert and Erna Stickel appeared personally.

Objector John Hubert Schieffer appeared personally.

Objectors Mearl and Irene Detienne appeared personally.

Objectors Henry and Lois Damm appeared personally.

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Objector "Fallon Water Well" (domestic water supply for the town of Fallon) was represented by Evelyn McMakin.

Anna Huber and Dorothy Schieffer also attended the hearing.

Walter Rolf, Field Manager for the Miles City Water Rights Bureau Field Office, and Paul Lemire, Geohydrologist for the Department of Natural Resources and Conservation (the "Department"), appeared as staff experts for the Department.

Louise Schmidt, Leonard Neumiller, Jacob Huber, Mr. and Mrs. Adolph Schott, Robert and Mary Ruth Lausch, Jacob J. Schwartz, Clara Dirks, Clinton and Sheila Rakes, Marvin, Joe and Jane Brush, Daniel Dukart, James and Julie Sumrall, Emilie Schwabe, Bernard Rakes, and William and Mary Twitchell filed timely objections in this matter, but did not appear at the hearing or make written submissions other than their initial Objections. Donald and Dorothy Finneman filed a timely objection in this matter, and also sent a letter stating that they wished to continue their objection to the Application, but they did not appear at the hearing.

STATEMENT OF THE CASE

On January 26, 1984, the Applicant filed an Application for Beneficial Water Use Permit, seeking to appropriate 400 gallons per minute ("gpm") up to 93 acre-feet of groundwater per year for supplemental flood irrigation of 41.7 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 34 and 10.0 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34, all in Township 13 North, Range 52 East, Prairie County, Montana. The water is to be pumped from a well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34, Township 13 North, Range 52 East, for use from April 1 to October 31, inclusive, of each year.

The pertinent portions of the Application were published in the Terry Tribune, a newspaper of general circulation in the area of the source, on March 1 and March 8, 1984.

Thirty timely objections were filed to the Application.

Objections to the Application alleging that the proposed appropriation will adversely affect the Objectors' wells were received from Mr. and Mrs. Adolph Schott, Arthur and Elsie Neumiller, Robert and Evelyn McMakin, Evelyn McMakin for the Town of Fallon water well, Leonard Neumiller, Jacob J. Schwartz, Clara Dirks, Marvin, Joe and Jane Brush, Henry Gaub, Phillip and Jakobine Stotz, James and Julie Sumrall, and Mrs. Emilie Schwabe.

Objections alleging adverse effect, and specifically stating that the Fallon water table is low and that their wells could go dry if the Applicant is allowed to make the proposed appropriation, were received from Louise Schmidt, Robert and Mary Ruth Lausch, Larry and Jane Neumiller, Clinton and Sheila Rakes, Berta Lassle, George and Ella Armstrong, Daniel Dukart, Albert and Erna Stickel, William and Mary Twitchell, Henry and Lois Damm, and Bernard W. Rakes. Louise Schmidt and Daniel Dukart additionally stated on their Objections that they have already experienced problems with the water availability in their wells during dry summers.

Donald and Dorothy Finneman, John and Emma Smith, Ludwig and Alice Huber, Robert and Dorothy Caturia, Jacob Huber, John Hubert Schieffer, and Mearl and Irene Detienne filed objections generally alleging adverse effect on the Objectors' wells, and stating that the Applicant does not need and should not get the

groundwater for which Application has been made because he has irrigation water from the Buffalo Rapids Irrigation Project.

On May 31, 1984, the Miles City Water Rights Bureau Field Office sent copies of Paul Lemire's May 24, 1984 geohydrology report on the Application to all parties.

On June 6, 1984 the Miles City office received a letter from Donald Finneman stating that he wished to continue his objection. The letter generally alleges that the Applicant is receiving water from Buffalo Rapids and should not be allowed to pump pursuant to the proposed appropriation, and that any pumping by the Applicant will affect the wells in Fallon. The Field Office also received notice from George B. Armstrong that he wished to continue his objection.

EXHIBITS

The Applicant submitted two exhibits in support of the Application in this matter.

Applicant's Exhibit 1 is a photocopy of an aerial map of the Town of Fallon and the immediate surrounding area. The map is marked with an arrow indicating North, with Applicant's irrigated fields numbered 1, 2, and 3, and with the location of the well which is Applicant's proposed point of diversion. The map carries additional notations that are not relevant to this matter: only the markings in ballpoint pen (blue ink) pertain to the Application in this case.

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Applicant's Exhibit 2 is a photocopy of the Well Log Report prepared on the well for which the present Application has been made. Some of the data on the report indicates that the well was completed on September 30, 1983; that the well is 45 feet deep and penetrates hard shale for the last foot; that the static water level is 6 feet below land surface; and that the pumping level below land surface was 43 feet after five hours of pumping at 400 gpm.

Applicant's Exhibit 1 and 2 were accepted into the record without objection.

The Department offered one exhibit for admission into the record.

Department Exhibit 1 is an October 11, 1984 Memorandum from Paul Lemire, entitled "Supplement to the Geohydrology Report on the Sackman Application No. 54911 (dated May 24, 1984)". The Memorandum contains a brief discussion of a "drawdown scenario" different than those presented in the May 24, 1984 Geohydrology Report, and has an attachment marked as "Figure 1" which shows drawdown parameters based on two different transmissivity rates.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. The Application for Beneficial Water Use Permit in this matter was duly filed with the Department of Natural Resources and Conservation on January 26, 1984, at 2:55 p.m.

3. The Applicant intends to use the water for supplemental irrigation, which is a beneficial use. MCA § 85-2-102(2).

4. The source of supply for the proposed appropriation is groundwater.

5. The Applicant in this matter is Sackman, Inc., a Montana corporation organized for farming and ranching operations.

6. Herbert Sackman, representing the Applicant Sackman, Inc., testified that he has drilled a groundwater well on the north part of his property, and that he needs the proposed appropriation of the groundwater to supplement the irrigation water he receives from the Buffalo Rapids Irrigation Project. He stated that he already has purchased a pump for the well.

Mr. Sackman testified that presently it takes too long to get the entire acreage irrigated, and that the delay hurts the crop. He stated that currently water is pumped to the fields, which are flood-irrigated, but that the water from Buffalo Rapids is not always enough. Water has to be dammed and then siphoned into a pipe to carry it to the twenty-acre field on the other (south) side of the highway. The water that spills over the dam is "just

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going to waste" because there isn't enough of it to use: Mr. Sackman stated that if the spillage could be combined with water from the well, it could be used. He further stated that, when there is a water shortage and Buffalo Rapids water users are put on rationing, he is only able to irrigate his few short irrigation runs; most of his irrigation runs are long, and require a large head of water.

Mr. Sackman testified that he grows alfalfa, and sometimes oats, on the proposed place of use, and that he gets three crops per year. In 1983, he irrigated the first cutting for 26 days, the second for 26 days, and the third cutting for 27 days. In 1984, he spent 24 days irrigating the first cutting, 29 days irrigating the second cutting, and 28 days irrigating the third cutting. He testified that he ceases irrigation for approximately two weeks between cuttings.

Mr. Sackman stated that he did not know how much water it takes to irrigate alfalfa, but that he knows he would like it to take two weeks to irrigate the acreage, and that he needs all the flow he can get to build a head of water for the long irrigation runs. He testified that he came up with the 400 gpm flow figure for which he applied because the well driller put a pump in the well to clean it out, and got a 400 gpm flow.

He stated that the highway through his property makes irrigation more difficult; that he has to set the water twice instead of once, and that it takes more water. He also stated that he would prefer not to have to make the 14-mile round trip

to reset the irrigation flow, and that he does not want to have to buy "extra water" from Buffalo Rapids to increment the 96.3 acre-feet that is paid for through property taxes.

Mr. Sackman testified that he doesn't plan on using any of the proposed groundwater appropriation on the 20.1-acre field south of the highway, since he doesn't have any way to get it there. The groundwater would only be used on the 31.6 acres north of the highway. He stated that he would be willing to reduce the requested volume amount but that he wished to retain the flow rate requested in the Application, since he needs it to build head for carrying water through the long irrigation runs.

Mr. Sackman stated that he would agree to limit his pumping to periods of 21 days, and that he would agree to stop pumping for a while if the pumping is affecting the Objectors' wells, and resume pumping after the water level had recovered.

7. The Well Log Report for the Applicant's well (Applicant's Exhibit 2) indicates that the well is 45 feet deep, penetrating into hard shale for the last foot. The report, and testimony by Herbert Sackman, indicate that water was found in the 6-foot to 25-foot deep range. However, Department hydrologist Paul Lemire testified that the 25-foot to 42-foot level probably is in saturated blue sand.

Static water level at the time of drilling was 6 feet below the land surface. The pumping level after five hours of pumping at 400 gpm was 43 feet below land surface.

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8. The geohydrology report in this matter (Torrey and Swenson (1961), discussed in the May 24, 1984 Memorandum by Paul Lemire), indicates that the Applicant's well and the Objectors' wells draw from a sand and gravel aquifer located in a floodplain terrace deposited by the Yellowstone River. The terrace consists of silty and sandy soil underlaid by sand and gravel, and is up to 42 feet thick in the vicinity of Fallon.

Beneath the sand and gravel deposit is the Tertiary-aged Fort Union Formation. This unit consists of interbedded sandstone, siltstone, and shale with thin beds of coal. The Fort Union Formation is up to 700 feet thick.

Underlying the Fort Union Formation is the Cretaceous-aged Fox Hills and Hell Creek Formations which consist of sandstones with interbedded carbonaceous shale and mudstone. The Fox Hills/Hell Creek Formation and the Fort Union Formation are important aquifers for domestic drinking water to the people of Fallon. The sand and gravel terrace aquifer is generally used for lawn and garden watering. (Lemire Report, p. 3).

The Applicant's well is 45 feet deep, and the Objectors' wells range from 18 to 32 feet deep, some of them being hand-dug.

9. Objector Evelyn McMakin appeared as representative for the Town of Fallon water well. She testified that the town water well is a 600-foot deep artesian well which supplies drinking water for 20 or more families. The well water is used exclusively for drinking, and is not used for lawn and garden purposes. Mrs. McMakin stated that any detriment to the town well would affect a lot of families.

Mrs. McMakin testified that the McMakins have not experienced any problems yet with their personal 20-foot deep well.

10. The geohydrologic information in this matter indicates that the Fallon well draws water from the Fort Union or Fox Hills/Hell Creek artesian aquifers, which are hydrologically isolated from the shallow terrace aquifer which is tapped by the Applicant's well. (Lemire Report, pp. 5, 8). Paul Lemire testified that the fact that the Fallon artesian well water is soft, as opposed to the hard water of the shallow terrace aquifer, indicates the lack of connection between the aquifers.

11. Objector George Armstrong stated that he lives to the southeast of the Applicant's property, and that he has a 22-foot deep hand-dug well which he uses for domestic purposes and lawn and garden irrigation. Mr. Armstrong testified that the water table has dropped two feet in the last few years; that he had 7 feet of water in his well when he put his pump in six years ago, but that he only has 5 feet of water now.

Mr. Armstrong testified that he pumps at 110 gpm and gets about 30 inches of drawdown while pumping. He stated that when he's pumping, "Janey's well" (Jane Neumiller's well) dries up. He estimated the distance between the Armstrong and Neumiller wells to be 200 to 300 feet. He stated that the record should show that practically everyone in Fallon uses their well for various domestic uses, as well as for irrigation.

12. Objector Jane Neumiller testified that they have a shallow well they use for irrigation and domestic purposes. The current static water level in their well is 20 feet below the surface, their pump is at 25 feet, and the "well level" is

28 feet. She stated that when the Armstrongs started pumping, it lowered the Neumiller well, and the Neumillers had to go lower.

Mrs. Neumiller testified they are "next to Sackman", and that the Applicant's proposed pumping rate will certainly affect them, if Armstrong's pumping did. (The Applicant estimated the distance between the Sackman well and the Neumiller well to be 500 feet; George Armstrong estimated the distance at closer to 300 feet.)

13. Objector Mearl Detienne testified that they have a 21-foot deep well which they use for domestic and lawn and garden irrigation purposes. He testified that presently they have a static water level of 7 feet, but that the water depth drops to 54 inches after 5 to 10 minutes of pumping at 10 gpm. Mr. Detienne stated that he has a submersible pump in his well which is 30 - 32 inches long, and that he is afraid that the pump will pull air and burn out if the water level drops further as the result of Applicant's pumping.

14. Objector Hubert Schieffer testified that he has a 22-foot deep well, with 16 feet of water. He testified that the summer (1984) was "kind of a dry summer", and that when everybody was irrigating their gardens in Fallon, he couldn't get water from his well. Mr. Schieffer stated that he believes Applicant's proposed appropriation is bound to make the water situation worse, and that it will affect him by incrementing the effects he is already experiencing from other people pumping from the aquifer.

15. Objector Henry Gaub testified that he objects to the proposed appropriation because the Applicant can get water from

Buffalo Rapids, while the rest of the people don't have any water source other than their wells.

16. Objector Henry Damm testified that he has a shallow well which is used for domestic and irrigation purposes, and which is located about 1000 feet from the Applicant's well.

17. Objector Robert Caturia testified that he has a 26-foot deep well and a 29-foot deep well, which he uses for domestic and irrigation purposes.

18. Objector Albert Stickel testified that he has a well down to "about 17 feet with a barrel under it"; that he has never yet run out of water, but is not sure what will happen if the Applicant pumps.

19. The geohydrology report and testimony by Paul Lemire in this matter indicate that the Applicant's well is drawing water from the same shallow sand and gravel aquifer that is the source for all of the Objectors' private water wells (see Finding of Fact 8). Since there is no detailed information available on this aquifer, the geohydrology report based the drawdown analysis on a range of transmissivity values for unconfined sand and gravel aquifers. (See May 24, 1984 Geohydrology Report, pp. 3, 5; Department Exhibit 1.).

The "worst case" analysis, which assumes a low transmissivity rate¹ of 50,000 gallons per day per foot, continuous pumping at 400 gpm for 52.6 days (the time it would take to reach the Applicant's requested volume amount), and no recharge to the wells, indicates that most of the Objectors' wells would experience 1 to 3 feet of drawdown under these circumstances.

¹ The rate at which water passes through the aquifer.

Under the worst case scenario, "two objectors, George Armstrong and Larry Neumiller, will experience approximately a 3-foot decline in the static water level of their wells as a result of pumping from the Applicant's well. Objectors Finneman, Detienne, Smith, Schott, Clinton, Rakes, Brush, and Twitchell will experience a decline of approximately 2 feet in the static water level of their wells. The remaining objectors will experience declines of 1 foot or less as a result of pumping from the applicant's well at the proposed rate, volume, and duration." (May 24, 1984 Geohydrology Report, p. 5.)

20. The well depth of those of the Objectors' wells for which there is information ranges from 18 to 32 feet deep. The present static water level in the Objectors' wells is 16 feet below the land surface, resulting in water depths of 2 feet (Stickel) to 16 feet (Huber). Once the maximum ("worst case") drawdown is taken into account, the various Objectors are left with anywhere from 1 foot of water in their well (Stickel) to 15 feet of water (Huber), depending upon the distance of their well from the Applicant's well. (May 24, 1984 Geohydrology Report, p. 7.)

Paul Lemire wrote an October 11, 1984 Supplement to the Geohydrology Report (Department Exhibit 1) in response to a claim by the Applicant that the 52.6 day pumping period used in the original calculations was not realistic. Mr. Lemire calculated a new drawdown scenario using the same transmissivity rates and the same pumping rate, but a different pumping schedule of 14 days continuous pumping followed by 14 days of no pumping. The

projected figures assumed that the 14 days on/14 days off cycle would be repeated three times each irrigation season, to meet Applicant's cropping pattern.

The revised pumping schedule does not lead to much difference in drawdown: the radius around the Applicant's well inside which 3 feet of drawdown would be experienced is 400 feet instead of the 500 feet in the previous calculations, and the radius for 1 foot of drawdown decreases from 1600 to 1400 feet.

Mr. Lemire stated that the revised pumping schedule would lead to a more rapid water level recovery in Applicant's own well, but that recovery would still take a week or so out at the 1400 foot radius. The water should return to 80 percent or 90 percent of its original level in a matter of days after the Applicant ceases pumping.

Mr. Lemire testified that the drawdown would be less severe if the transmissivity rate is greater than 50,000 gallons per day per foot, or if the Applicant pumped at a lower rate than the proposed 400 gpm. In addition, the geohydrology report indicates that there will be recharge to the aquifer, from irrigation in the area and from Buffalo Rapids canal seepage, that will reduce the severity and extent of the drawdown caused by Applicant's pumping. (See May 24, 1984 Geohydrology Report, p. 5. The drawdown analysis assumed no recharge.)

Mr. Lemire stated that a U.S.G.S. study leads him to believe that the water table in the Fallon area is 3 to 5 feet higher than it was before the Buffalo Rapids irrigation project went in,

and therefore that there is now more water during the irrigation season than there was when the Objectors' wells were dug.

In response to a water quality question, Mr. Lemire stated that the proposed pumping could have the effect of pulling water from an area of poor quality and inducing it into the aquifer in the area of the wells. In response to a statement that a creek north of Fallon is "half alkali", Mr. Lemire responded that there hasn't been much study conducted. However, groundwater in that area moves generally from south to north, discharging into the Yellowstone River. (See May 24, 1984 Geohydrology Report, p. 3.)

Based upon the foregoing proposed Findings of Fact, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all the parties hereto, whether present at the hearing or not.
2. Those parties who failed to appear at the hearing in this matter are in default pursuant to Administrative Rule of Montana § 36.12.208.
3. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

4. The Department must issue a permit in an application for new appropriation if the applicant proves by substantial credible evidence:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

5. The use proposed by the Applicant, irrigation, is a beneficial use of water. MCA § 85-2-102(2).

6. The Applicant's proposed means of diversion, construction, and operation of its appropriation works are adequate. See generally, State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

7. The geohydrology information in the record indicates that there are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant and in the amount the Applicant seeks to appropriate, and that the amount requested is available throughout the period during which the Applicant seeks to appropriate. (See Findings of Fact 8 and 19, the May 24, 1984 Geohydrology Report prepared by Paul Lemire for the record in this matter, and Department Exhibit 1).

8. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

9. The Fallon water well will not be adversely affected by the proposed appropriation. Geohydrologic information indicates that the two wells are situated in different aquifers which are hydrologically isolated from one another. (See Findings of Fact 8 and 19, and the May 24, 1984 Geohydrology Report by Paul Lemire.)

10. It is impossible to ascertain from the record in this matter whether the water rights of a prior appropriator will be adversely affected. The "worst case scenario" presented in the May 24, 1984 Geohydrology Report indicates that, under certain circumstances, the Objectors could be left with very little water in their wells. (See Finding of Fact 19.)

It is likely that the drawdown will not be as severe as is projected under the "worst case scenario", since the effects of Applicant's pumping will be mitigated by recharge to the aquifer and, to a lesser degree, by the Applicant's proposed pumping schedule. However, the Geohydrology Report does not take into account the drawdown caused by the Objectors' own pumping, which affects their own wells and causes mutual interference between the wells. (See Findings of Fact 11, 12, 13).

It is clear from the record in this matter that many of the Objectors' wells are operating on a shallow water reserve, and that even a small additional drawdown could render some of the Objectors' wells inoperable. Foreseeable impacts of drawdown

include the necessity to deepen some of the Objectors' wells, replace pumps that will burn out if the water level falls too low, and install larger pumps needed for the greater pumping lift.

Obviously, it is difficult for a potential appropriator to accurately foresee the effects of pumping groundwater, especially when there is little or no data available on the transmissivity and other salient characteristics of the source aquifer. A requirement that an applicant for groundwater permit must be able to present accurate and comprehensive hydrological information on the aquifer he proposes to tap would effectively forestall most appropriations of groundwater. Such a result is not consistent with the maximization of the use of state waters which it is the policy of the Montana Water Use Act to encourage. See MCA § 85-2-101(3).

11. Herbert Sackman testified that he would cease pumping if the Objectors could show that his pumping is detrimentally affecting their wells. (See Finding of Fact 6). However, such an approach, where the impacts would be assessed after the issuance of the permit, ignores the statutory requirement that the Applicant prove, prior to issuance of a permit, that the water rights of a prior appropriator will not be adversely affected. MCA § 85-2-311(b). In addition, "the attenuated connection between the pumping of a well and its effects often leads to little recourse for the senior appropriator" once a permit has been issued and acted upon. In the Matter of the Application for Beneficial Water Use Permit No. 25170-g41B by

East Bench Grain & Machinery, Inc., Final Order, March 28, 1983,
p. 5.

The Applicant has failed to sustain its burden of proof in regard to adverse effect. However, it is likely that the sole means by which the Applicant can satisfy this burden of proof is to begin pumping and monitor the resulting effect on the Objectors' wells. Since the Applicant has met the burden of proof on the other statutory criteria, and since it is likely that the remaining criteria can be met for some amount of appropriation (albeit possibly not for the full flow rate requested), the Hearing Examiner believes that the Applicant should be given an Interim Permit for testing purposes, so that it has a chance to develop the proof.

The grant of an Interim Permit should not act as a detriment to the Objectors, since approval of the applied-for Provisional Permit is not automatic, but is contingent upon further proof by the Applicant that the Objectors' prior appropriative rights will not be adversely affected. The grant of an Interim Permit will not harm the Applicant, since the alternative is to deny its Application on the basis that it has not met the burden of proof regarding adverse effect, and since Mr. Sackman already has completed the well and purchased the equipment and therefore will not be unduly financially burdened by participation in a monitoring program.

12. Montana Administrative Rule § 36.12.104 states:

ISSUANCE OF INTERIM PERMITS (1) Pending final approval or denial of an application for a regular permit, the department may, in its discretion and upon proper application, issue an interim permit authorizing an applicant to begin appropriating water immediately.

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(a) The department may not issue an interim permit unless there is substantial evidence that the criteria for issuing a regular permit under section 85-2-311, MCA, will be met.

(b) An interim permit may be issued subject to any terms and conditions the department considers necessary to protect the rights of prior appropriators.

(2) An interim permit is subject to revocation by the department in accordance with 85-2-314, MCA.

(3) The issuance of an interim permit does not entitle an applicant to a regular permit, and approval of the application for a regular permit is subject to the procedures and criteria set out in the act.

(4) A person may not obtain any vested right to an appropriation obtained under an interim permit by virtue of the construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the regular permit is denied or is modified from the terms of the interim permit.

13. The § 85-2-311 criteria have been met in this matter, apart from the requirement that the Applicant prove the water rights of prior appropriators will not be adversely affected. However, there is substantial evidence to indicate that the Applicant may be able to meet this criterion, especially if there is adequate test data upon which to base long-term permit conditions. See Finding of Fact 19.

14. The issuance of an Interim Permit does not entitle the Applicant to a provisional ("regular") permit. To be entitled to a provisional permit, the Applicant is still required to prove by substantial credible evidence that its appropriation will not adversely affect the water rights of a prior appropriator.

The purpose of issuing an Interim Permit in this matter is to allow the Applicant a testing period in which to prove, through pumping in accordance with the application for permit, that in fact the appropriation will not adversely affect senior water use

rights. An Interim Permit will allow the Applicant to gather the data, unobtainable by any other means, which is necessary for it to show the existence of the § 85-2-311 statutory criteria. Without this proof, no provisional permit will be issued.

15. With the exception of § 85-2-311(b), all statutory criteria have been proved by substantial credible evidence, and need not be addressed at the review stage necessary prior to the issuance of a regular permit. See In the Matter of the Application for Beneficial Water Use Permit No. 50272-g42M by Joseph P. Crisafulli, Interlocutory Order, September 11, 1984.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, an Interim Permit is hereby granted to Sackman, Inc. to appropriate 400 gpm up to 93 acre-feet per year for supplemental flood irrigation of 31.6 acres; 10 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34 and 21.6 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 34, Township 13 North, Range 52 East, Prairie County, Montana. The source of supply is groundwater, to be diverted by means of a well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34, Township 13 North, Range 52 East, Prairie County, Montana. The period of use is April 1 to October 31, inclusive, of each year.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. In order to receive an Interim Permit in this matter, the Applicant must elect to pay all reasonable and necessary costs of installing and maintaining a well-monitoring system capable of recording the effects Applicant's pumping has on the source aquifer, with regard to the wells of the prior appropriators. The type of measuring device used, the installation and maintenance of the device, and procedures for keeping accurate records of the resulting data shall be subject to the supervision of a Department geohydrologist or his delegee.

Prior to commencing any appropriation pursuant to the Interim Permit, the Applicant must have contacted one of the Department geohydrologists and made acceptable test arrangements, including payment of any necessary costs and fees. The Applicant shall submit the agreed-upon monitoring plan to the Department in written form for review before commencing irrigation.

B. The Permittee shall install a flow meter on its own well, capable of measuring the amounts and times of pumping.

C. The Permittee shall keep a written record of the flow rate and volume of all waters withdrawn, including the times of pumping, and shall make these records available to the Department upon request.

D. The Permittee shall cease pumping immediately upon notification by the Department that it has received a complaint by a prior appropriator alleging that the Permittee's pumping is affecting the prior appropriator's well to the extent that the senior water rights cannot reasonably be exercised. The Permittee shall not resume pumping until the Department notifies it of its right to do so.

E. Upon receipt of a written complaint alleging adverse effects to a prior appropriator, the Department may make a field investigation of the project. If the field investigation yields sufficient evidence to indicate that the prior appropriator would be able to exercise the water right in the absence of

appropriation by the Permittee, the Department may conduct a hearing in the matter, allowing the Permittee to show cause why the Interim Permit should not be modified or revoked. The Department may then modify or revoke the Permit to protect existing rights, or may allow the Permit to remain unchanged if the Hearings Officer determines that no existing rights are being adversely affected by exercise of the Permit.

F. This Interim Permit is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

G. This Interim Permit is subject to MCA § 85-2-505, which requires that all wells be so constructed and maintained as to prevent wasting water or contamination of other water sources, and that all flowing wells be capped or equipped with valves so that the flow of water can be stopped when the water is not being put to beneficial use.

H. The issuance of this Interim Permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing this

Permit, acknowledge any liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

I. This Interim Permit shall be valid through October 31, 1986, for purposes of determining the effects of the Permittee's pumping on the source aquifer and on the prior appropriators of that aquifer. Subsequent to the expiration of the Interim Permit in this matter, the Permittee and the prior appropriators will be allowed to present further evidence on the issue of adverse effect.

J. The Miles City Water Rights Bureau Field Office, under the supervision of Paul Lemire, Gary LeCain, or their delegee, shall conduct periodic checks during times when the Permittee is appropriating water pursuant to this Permit, in order to determine the effects of the Permittee's pumping on the source aquifer and upon the senior beneficial water uses.

DONE this 15th day of May, 1985.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).

After expiration of any Interim Permit which is granted in this matter, a review will be held to allow the Applicant and the Objectors to present further evidence on the issue of adverse effect. After presentation of evidence, the Hearing Examiner will make a determination as to whether all statutory criteria have been met and a provisional permit may issue in this matter. All parties will have an opportunity to present exceptions to the determination and to request further oral argument prior to a final Department decision herein.

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 15, 1985, she deposited in the United States mail, First class mail, an order by the Department on the Application by Sackman, Inc., Application No. 54911-g42M, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Sackman, Inc., Box 11, Terry, MT 59349
2. Bruce M. Brown, Attorney, Box 128, Miles City, MT 59301
3. Mr. & Mrs. Adolph Schott, Fallon, MT 59326
4. Arthur & Elsie Neumiller, Fallon, MT 59326
5. Louise Schmidt, Box 242, Fallon, MT 59326
6. Robert & Evelyn McMakin, Box 216, Fallon, MT 59326
7. Donald S. & Dorothy Finneman, Box 6, Fallon, MT 59326
8. Fallon Water Well, Evelyn McMakin, Box 216, Fallon, MT 59326
9. Robert & Mary Ruth Lausch, Rt. 2, Box 11, Terry, MT 59349
10. Leonard Neumiller, Box 172, Fallon, MT 59326
11. Larry & Jane Neumiller, Box 1683, Colstrip, MT 59323
12. Jacob J. Schwartz, P. O. Box 175, Fallon, MT 59326
13. Clara Dirks, Fallon, MT 59326
14. Clinton & Sheila Rakes, Box 264, Fallon, MT 59326
15. Berta Lassle, Box 262, Fallon, MT 59326
16. George & Ella Armstrong, Fallon, MT 59326
17. A. Lance Tonn, Lucas & Monaghan, P. C., P. O. Box 728, Miles City, MT 59301
18. Marvin, Joe & Jane Brush, Box 54, Fallon, MT 59326

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19. John & Emma Smith, Box 72, Fallon, MT 59326
20. Daniel V. Dukart, P. O. Box 53, Fallon, MT 59326
21. Henry Gaub, Box 126, Fallon, MT 59326
22. Phillip & Jakobine Stotz, Box 203, Fallon, MT 59326
23. Ludwig R. & Alice Huber, P. O. Box 24, Fallon, MT 59326
24. Robert & Dorothy Caturia, P. O. Box 171, Fallon, MT 59326
25. Albert & Erna Stickel, P. O. Box 205, Fallon, MT 59326
26. Jacob Huber, Fallon, MT 59326
27. James D. & Julie Sumrall, Box 251, Fallon, MT 59326
28. John Hubert Schreffler, Box 215, Fallon, MT 59326
29. Mrs. Emilie Schwabe, Box 52, Fallon, MT 59326
30. Mearl & Irene Detienne, Box 273, Fallon, MT 59326
31. William A. & Mary M. Twitchell, Box 62, Fallon, MT 59326
32. Henry & Lois Damm, Fallon, MT 59326
33. Bernard W. Rakes, Box 183, Fallon, MT 59326
34. Walter Rolf, Water Rights Bureau Field Office, Miles City, MT
(inter-departmental mail)
35. Peggy A. Elting, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 15th day of May, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Kohn

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-88

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